Supreme Court, U. S.
FILED
JUL 10 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

TERM, 1978

No. 78-57

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF REVENUE, *Appellee*,

vs.

FIVE-R EXCAVATING, INC., *Appellant*.

No.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF REVENUE, *Appellee*,

vs.

J & R EQUIPMENT
RENTAL COMPANY, INC., *Appellant*.

ON APPEAL FROM
THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgments of the Supreme Court of Pennsylvania, dated April 7, 1978, and entered on April 11, 1978, affirming orders of the Commonwealth Court of Pennsylvania, which affirmed the orders of the Board of Finance and Revenue dismissing Appellants' Petitions for Review of adverse rulings on Petitions for Sales and Use Tax Reassessments. The appeals of both Appellants are related and present identical questions of fact and law, and, by stipulation, were argued together in the courts below as a single appeal. Pursuant to Rule 15(3) of the rules of this Court, a single Jurisdictional Statement covering both appeals is being filed with this Court. This Jurisdictional Statement is presented to show that the Supreme Court of United States has jurisdiction of the appeals and that a substantial question is presented.

OPINION BELOW

The Supreme Court of Pennsylvania affirmed the orders of the Commonwealth Court in per curiam opinions dated April 7, 1978, and entered April 11, 1978, reading, in their entirety "Order affirmed." These opinions have not been officially reported.

The opinion of the Commonwealth Court of Pennsylvania, from which the appeals to the Supreme Court of Pennsylvania were taken, is reported at 28 Pa. Commonwealth Ct. 558, 368 A.2d 1389 (1977).

No opinion was issued by the Board of Finance and Revenue.

Copies of the opinion and orders of the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania, and the orders of the Board of Finance and Revenue, are attached hereto as Appendix "A".

JURISDICTION

This action was commenced by Appellants, following sales and use tax assessments against them, as petitions for reassessment filed with the Board of Review, Bureau of Sales and Use Tax, Pennsylvania Department of Revenue, pursuant to §232 of the Pennsylvania Tax Reform Code of 1971, 72 P.S. §7232. From the Board's decisions sustaining the assessments, petitions for review were filed with the Board of Finance and Revenue, pursuant to §234 of the Code, 72 P.S. §7232. The Board of Finance and Revenue entered Orders on August 4, 1972 refusing both Petitions for lack of jurisdiction. These orders were affirmed by the Commonwealth Court of Pennsylvania by its Order entered February 10, 1977, and an appeal was taken to the Supreme Court of Pennsylvania on March 1, 1977. The orders of the Supreme Court of Pennsylvania dated April 7, 1978 and entered April 11, 1978, affirmed the decision of the Commonwealth Court, and from those orders, the present appeals have been taken. Notices of Appeal to this Court were filed with the Commonwealth Court of Pennsylvania on June 29, 1978, as the record had been remitted to that Court by the Pennsylvania Supreme Court. Copies of the Notices of Appeal are attached hereto as Appendix "B".

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code §1257(2).

THE STATUTE INVOLVED

These appeals involve the validity of §234 of the Pennsylvania Tax Reform Code of 1971, P.L. 6, No. 2, Art. I, §234, 72 P.S. §7234, the text of which is set forth in its entirety as follows:

> Within sixty days after the date of mailing of notice by the department of the decision on any petition for reassessment filed with it, the person against whom such assessment was made may, by petition, request the Board of Finance and Revenue to review such decision. The failure of the department to notify the petitioner of a decision within the time provided for by Section 232 shall act as a denial of such petition, and a petition for review may be filed with the Board of Finance and Revenue within one hundred twenty days of the date prior to which the department should have mailed to the petitioner its notice of decision. Every petition for review filed hereunder shall state specifically the reasons on which the petitioner relies, or shall incorporate by reference the petition for reassessment in which the reasons are stated. The petition shall be supported by affidavit that it is not made for the purpose of delay and that the facts set forth therein are true. The Board of Finance and Revenue shall act finally in disposing of petitions filed with it within six months after they have been received. In the event of the failure of the board to dispose of any petition within six months, the action taken by the department, upon the petition for reassessment shall be sustained. The Board of Finance and Revenue may sustain the action taken by the department on the petition for reassessment, or it may reassess the tax due on such basis as it deems according to law. The board shall give notice of its action to the department and to the petitioner.

QUESTION PRESENTED

Where §234 of the Pennsylvania Tax Reform Code of 1971 provides that appeals from decisions from the Department of Revenue on petitions for tax reassessment shall be taken within sixty days after the date of mailing of notice by the Department of its decision, is the statute in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, in affording unequal appeal periods to taxpayers, depending

upon their location within the Commonwealth and the time required for mail delivery to them, and thereby invalid as applied to appellants who were afforded less than sixty days from receipt of notice within which to take an appeal.

STATEMENT

The material facts pertaining to these appeals were stipulated to by the Appellants and the Commonwealth of Pennsylvania in both the Commonwealth Court and the Supreme Court of Pennsylvania, and may be stated as follows.

Appellant, J & R Equipment Rental Company, Inc., (hereinafter "J & R") is engaged in the business of leasing heavy construction equipment, and, in connection with that business, leases heavy construction equipment to Appellant, Five-R Excavating, Inc. (hereinafter "Five-R"). Following audits of both corporations by the Pennsylvania Department of Revenue, J & R was assessed sales tax of $13,329.58, plus interest and penalty, and Five-R was assessed use tax of $13,353.31, plus interest and penalty. Each corporation filed petitions for reassessment with the Board of Review, Sales & Use Tax, which sustained the assessments and abated the penalties, and provided that the sales tax assessment of J & R would be striken in its entirety upon payment by Five-R of its use tax assessment.

The decisions of the Board of Review were mailed to Five-R and J & R on February 14, 1975 and were received on February 15, 1975.

Both Five-R and J & R appealed to the Board of Finance and Revenue by Petitions for Review which were mailed on April 14, 1975. Both Petitions were received by the Board of Finance and Revenue and were marked with a time stamp indicating receipt on April 16, 1975 at 8:36 a.m.

The Board of Finance and Revenue notified Appellants of its intention to refuse jurisidiction on the grounds that the Petitions for Review were not filed in the time required by §234 of the Tax Reform Code of 1971. Following oral argument before the Board, directed solely to the question of jurisdiction, the Board entered identical orders with respect to each Appellant, stating that:

> This Petition for Review is refused for lack of jurisdiction in that the requirements of Section 234 of The Tax Reform Code of 1971 have not been met.

It was from these orders that appeals to the Commonwealth Court of Pennsylvania and to the Supreme Court of Pennsylvania were taken as stated above.

The issue of the constitutionality of §234 of the Tax Reform Code of 1971 was presented to the Board of Finance and Revenue in Appellants' brief and in oral argument to the Board. In the Appellants' appeal to the Commonwealth Court, this issue was included in Appellants' brief as an alternative ground for reversal of the Board's order, and the Commonwealth Court, in its opinion, (see Appendix "A"), addressed this issue specifically, holding that the statute was not violative of the Equal Protection Clause of the Fourteenth Amendment. In Appellants' appeal to the Supreme Court of Pennsylvania, the constitutionality of the statute was again specifically raised as an alternative legal ground for reversal. The Supreme Court of Pennsylvania did not issue a formal opinion, discussing the legal questions presented, but affirmed the orders of the Commonwealth Court in per curiam opinions and orders.

The opinions and orders of the Pennsylvania Supreme Court dated April 7, 1978 and entered April 11, 1978, from which this appeal has been taken, constitute final judgments in actions in which the validity of a state statute was drawn in question on the ground of its being repugnant to the

Constitution of the United States, and in which the decisions were in favor of its validity. This Court, therefore, has jurisdiction of these appeals under 28 U.S.C. §1257(2).

THE QUESTION IS SUBSTANTIAL

These appeals present the question of the constitutionality, under the Equal Protection Clause of the Fourteenth Amendment to the Constitution, of a statute which fails to afford to all taxpayers within the Commonwealth of Pennsylvania an equal period of time within which to prepare and file an appeal from adverse tax decisions of the Pennsylvania Department of Revenue. Under §234 of the Pennsylvania Tax Reform Code of 1971, the appeal period commences with the date when the Department's decision is mailed to the taxpayer, rather than the date on which the taxpayer receives notice of that decision. Consequently, the actual time which a taxpayer is accorded for preparation and filing of an appeal depends upon the time of receipt of notice, and, thus, differs throughout the Commonwealth, based upon the location of the taxpayer and the time required for mail delivery to him.

The significance of the constitutional question raised by such an appeal statute was recognized by Judge Kramer of the Commonwealth Court of Pennsylvania in a dissenting opinion filed in the case of *Commonwealth v. Niemeyer Oldsmobile, Inc.*, 12 Pa. Commonwealth Ct. 388, 316 A.2d 152 (1974), a prior case factually similar to the case at bar, and involving the same provisions of the Tax Reform Code. *See, also,* dissents filed by Judge Kramer in *Purolator Courier Corp. v. Pennsylvania Public Utilities Commission*, 13 Pa. Commonwealth Ct. 444, 319 A.2d 688 (1974), and *Duggan v. Environmental Hearing Board*, 13 Pa. Commonwealth Ct. 339, 343, 321 A.2d 392 (1974).

The precise issue raised in these appeals has apparently not received previous consideration by this Court. However, the question presented directly involves the equality of access to a state's appellate procedures.

The decisions of this Court have consistently held that, while a state is not constitutionally bound to provide for appellate review, a state which does so provide may not impose upon the right of appeal discriminatory limitations denying equal protection of the law. *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

The principle enunciated in *Douglas* and *Griffin* with respect to criminal appeals have been applied to discrimination in civil appeals as well. *Lindsey v. Normet*, 405 U.S. 56 (1972).

The standard to be applied in determining the validity of discriminatory legislation has been stated by this Court, in *Rinaldi v. Yeager*, 384 U.S. 305, 310-311, (1966), as follows:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. . . . It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. "The Constitution does not require things which are different in fact *** to be treated in law as though they were the same." . . . Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made." (citations omitted).

The statute at issue in these appeals creates a distinction between potential appellants based solely upon geographi-

cal location within the Commonwealth, a distinction which serves no reasonable state purpose, and it is, therefore, invalid under the Equal Protection Clause of the Fourteenth Amendment.

It is respectfully submitted that the question presented by these appeals is substantial and presents a matter of public importance.

Respectfully submitted,

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APPENDIX "A"

In The

Commonwealth Court of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA v. J & R EQUIPMENT RENTAL CO., INC., *Appellant*	No. 1248 C. D. 1975
COMMONWEALTH OF PENNSYLVANIA v. FIVE-R EXCAVATING, INC., *Appellant*	No. 1249 C. D. 1975

Before:

Honorable James C. Crumlish, Jr., *Judge*
Honorable Glenn E. Mencer, *Judge*
Honorable Genevieve Blatt, *Judge*

ARGUED: December 6, 1976

OPINION

FILED:
OPINION BY JUDGE BLATT February 10, 1977

J & R Equipment Rental Company, Inc. (J & R) is a Pennsylvania corporation engaged in the business of leasing heavy construction equipment. Five-R Excavating Inc. (Five-R) is a Pennsylvania corporation which leases heavy construction equipment from J & R. Both J & R and Five-R were audited by the Department of Revenue, Bureau of Sales and Use Tax (Bureau) for the period of January 1, 1970 through September 30, 1973. As a result of these audits, the Bureau assessed a sales tax of $13,329.58 plus interest and penalty on J & R and a use tax of $13,353.31 plus interest and penalty on Five-R.

Both parties petitioned the Bureau for reassessment pursuant to Section 232 of the Tax Reform Code of 1971,[1] 72 P. S. §7232. The Bureau sustained the assessments but abated the penalties and ordered that payment by Five-R of its use tax assessment would result in the sales tax assessment against J & R being stricken in its entirety. The Bureau sent copies of these decisions and orders to both parties by certified mail on February 14, 1975, and these were received by the parties on February 15, 1975. J & R and Five-R appealed to the Board of Finance and Revenue (Board) pursuant to Section 234 of the Code, 72 P. S. §7234, by petitions for review mailed on April 14, 1975. Both petitions were received on April 16, 1975 by the Board, which subsequently refused them for lack of jurisdiction because they were not filed within the time required by Section 234 of the Code. The appeals of J & R and Five-R from these decisions of the Board have been consolidated in this Court.

[1]Act of March 4, 1971, P. L. 6, *as amended*, 72 P. S. §7201 et seq.

Section 234 of the Code, 72 P. S. §7234, provides in pertinent part:

> "*Within sixty days after the date of mailing of notice* by the department of the decision on any petition for reassessment filed with it, the person against whom such assessment was made may, by petition, request the Board of Finance and Revenue to review such decision." (Emphasis added.)

The petitions for review here were mailed by the appellants on the 59th day after the Bureau's decision on their petitions for reassessment had been mailed, and the petitions were received by the Board on the 61st day after the Bureau's original mailing. The appellants argue here that their mailing of the petitions for review within the sixty-day period provided by the Code is the equivalent of filing and that, therefore, their petitions were timely filed even though they were not received by the Board until after the sixty-day period had expired.

We considered and rejected the identical argument in *Commonwealth v. Niemeyer Olds, Inc.*, 12 Pa. Commonwealth Ct. 388, 316 A.2d 152 (1974). We held in *Niemeyer* that simply mailing a petition for review within the sixty-day period specified in Section 234 did not constitute filing and that *actual receipt* of the petition by the Board within the period was required. We can find no circumstances here that distinguish this case from *Niemeyer*, and we must hold, therefore, that the petitions for review filed by the appellants here were untimely and that, as a result, the Board had no jurisdiction to consider them.

Appellants also argue that the method of computation of the sixty-day appeal period specified in Section 234 is unconstitutional. Simply stated, their contention is that an appellant is denied equal protection of the law if the appeal period is considered to commence with the date of mailing

of notice by the Bureau. They claim that the interval which an individual taxpayer has for filing an appeal will differ depending upon his geographical location within the Commonwealth, and that, therefore, all petitioners are not treated equally. We disagree.

Section 234 clearly provides that the sixty-day appeal period is to be measured from the date of mailing of notice by the Bureau. Although it is true that the length of the interval between the mailing of notice by the Bureau and its receipt by a prospective appellant may well be dependent upon the party's geographical location relative to the place of mailing, we do not believe that the slight differential in the appeal period of individual taxpayers so resulting from differences in mail service will render the section constitutionally infirm. It is an established rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such procedure would also be applied to any other person in the state under similar circumstances and conditions. *Tinsley v. Anderson*, 171 U. S. 101 (1898). Section 234 gives all taxpayers a sixty-day period in which to bring their appeals, and we do not find it unreasonable that the act of mailing of notice is used as the guidepost for determining the start of this period. We cannot perceive that this results in any arbitrary classification of, nor discrimination among, taxpayers.

A party challenging the constitutionality of a statute has a heavy burden to overcome the presumption of the statute's validity and constitutionality, and, therefore, must establish that the statute plainly and clearly violates the Constitution. *Bensalem Township School District v. Bucks County Commissioners*, 8 Pa. Commonwealth Ct. 411, 303 A.2d 258 (1973). We do not believe that the appellants here have sustained this burden.

The order of the Board dismissing the petitions for review is, therefore, affirmed.

/s/ GENEVIEVE BLATT
Genevieve Blatt, *Judge*

Supreme Court of Pennsylvania
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA
v.
FIVE-R EXCAVATING, INC.,
Appellant

No. 111
March Term, 1977

ORDER

AND Now, this 7th day of April, 1978, it is ordered as follows:

__X__ Order Affirmed.

____ Order Reversed.

____ Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

____ Order Modified as set forth in opinion filed herewith.

____ Ordered as set forth in opinion filed herewith.

____ Costs to be taxed as provided by Chapter 27 of the Pa. R. A. P.

____ Costs to be taxed as provided in opinion filed herewith.

BY THE COURT

...../s/ SALLY MRVOS.....
Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing order was entered on the docket on the date set forth above. Order entered: April 11, 1978.

Supreme Court of Pennsylvania
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA
v.
J. & R. EQUIPMENT RENTAL COMPANY, INC.,
Appellant

No. 112
March Term, 1977

ORDER

AND Now, this 7th day of April, 1978, it is ordered as follows:

__X__ Order Affirmed.

____ Order Reversed.

____ Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

____ Order Modified as set forth in opinion filed herewith.

____ Ordered as set forth in opinion filed herewith.

____ Costs to be taxed as provided by Chapter 27 of the Pa. R. A. P.

____ Costs to be taxed as provided in opinion filed herewith.

BY THE COURT

...../s/ SALLY MRVOS.....
Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing order was entered on the docket on the date set forth above. Order entered: April 11, 1978.

[J. 89]

IN THE

Supreme Court of Pennsylvania

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE v. FIVE-R EXCAVATING, INC., *Appellant at 111.*	**Nos. 111 and 112 March Term 1977** Appeals from the Orders of the Commonwealth Court at Nos. 1248 and 1249 C. D. 1975 affirming the Orders of the Board of Finance and Revenue at Nos. RST-880 and RST-881.
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE v. J & R EQUIPMENT RENTAL CO., INC., *Appellant at 112.*	Entered: March 2, 1977

OPINION

PER CURIAM: FILED: April 7, 1978

Orders affirmed.

IN THE

Commonwealth Court of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA v. J & R EQUIPMENT RENTAL CO., INC., *Appellant*	**No. 1248 C. D. 1975**
COMMONWEALTH OF PENNSYLVANIA v. FIVE-R EXCAVATING, INC., *Appelant*	**No. 1249 C. D. 1975**

ORDER

AND, Now, this 10th day of February, 1977, the orders of the Board of Finance and Revenue, dated August 4, 1975, dismissing the appellants' petition for review are hereby affirmed.

/s/ GENEVIEVE BLATT

Genevieve Blatt, *Judge*

Certified From The Record

FEB 10, 1977

/s/ FRANCES C. BARBUSH
Chief Clerk

Docket No. RST-880

IN RE: FIVE-R EXCAVATING, INC.

PETITION FOR REVIEW OF action taken by the Department of Revenue on Petition for Reassessment of Sales Tax for the period of 1/1/70 to 9/30/73.

AND NOW TO WIT August 4, A.D. 1975, I certify that the following is the action of the Board of Finance and Revenue of the Commonwealth of Pennsylvania on this matter:

"And now to wit July 30, A.D. 1975,

This Petition for Review is refused because of lack of jurisdiction in that the requirements of Section 234 of the Tax Reform Code of 1971 have not been met."

BY ORDER OF THE BOARD OF FINANCE AND REVENUE

GRACE M. SLOAN, *State Treasurer and Chairman*

ROBERT P. KANE, *Attorney General*

C. DELORES TUCKER, *Secretary of the Commonwealth*

ROBERT P. CASEY, *Auditor General*

GEORGE J. MOWOD, *Secretary of Revenue*

Attest: /s/ L. W. WAGNER
Secretary, Board of Finance and Revenue

Copy mailed to:

Meyer, Unkovic & Scott
Attorneys at Law
1424 Frick Building
Pittsburgh, Penna. 15219.
Attn: Ronald D. Morelli, Esq.
on August 4, 1975.

Docket No. RST-881

IN RE: J & R EQUIPMENT RENTAL COMPANY

PETITION FOR REVIEW OF action taken by the Department of Revenue on Petition for Reassessment of Sales Tax for the period of 1/1/70 to 9/30/73.

AND NOW TO WIT August 4, A.D. 1975, I certify that the following is the action of the Board of Finance and Revenue of the Commonwealth of Pennsylvania on this matter:

"And now to wit July 30, A.D. 1975,

This Petition for Review is refused for lack of jurisdiction in that the requirements of Section 234 of the Tax Reform Code of 1971 have not been met."

BY ORDER OF THE BOARD OF FINANCE AND REVENUE

GRACE M. SLOAN, *State Treasurer and Chairman*

ROBERT P. KANE, *Attorney General*

C. DELORES TUCKER, *Secretary of the Commonwealth*

ROBERT P. CASEY, *Auditor General*

GEORGE J. MOWOD, *Secretary of Revenue*

Attest: /s/ L. W. WAGNER
Secretary, Board of Finance and Revenue

Copy mailed to:

Meyer, Unkovic & Scott
Attorneys at Law
1424 Frick Building
Pittsburgh, Penna. 15219
Attn: Ronald D. Morelli, Esq.
on August 4, 1975.

APPENDIX "B"

IN THE

Supreme Court of Pennsylvania

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, *Appellee,* vs. FIVE-R EXCAVATING INC. *Appellant.*	No. 111 March Term, 1977

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Five-R Excavating, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania dated April 7, 1978 and entered April 11, 1978.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

...../s/ W. REID LOWE.....

W. Reid Lowe
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Counsel for Appellant

PROOF OF SERVICE

The undersigned, counsel for Appellant, hereby certifies that a copy of the foregoing Notice of Appeal was served upon counsel of record for the Appellee, this 29th day of June, 1978, by mailing the same, first class, postage prepaid, to the following address:

Paul S. Roeder, Deputy Attorney General
Commonwealth of Pennsylvania
407 Finance Building
Harrisburg, PA 17120

...../s/ W. REID LOWE.....

W. Reid Lowe
Counsel for Appellant

IN THE

Supreme Court of Pennsylvania

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, *Appellee*, vs. J & R EQUIPMENT RENTAL CO., INC., *Appellant*.	**No. 112 March Term, 1977**

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that J & R Equipment Rental CO., Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania dated April 7, 1978 and entered April 11, 1978.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ W. REID LOWE

W. Reid Lowe
Meyer, Unkovic & Scott
1400 Frick Building
Pittsburgh, PA 15219
(412) 456-2800
Counsel for Appellant

PROOF OF SERVICE

The undersigned, counsel for Appellant, hereby certifies that a copy of the foregoing Notice of Appeal was served upon counsel of record for the Appellee, this 29th day of June, 1978, by mailing the same, first class, postage prepaid, to the following address:

Paul S. Roeder, Deputy Attorney General
Commonwealth of Pennsylvania
407 Finance Building
Harrisburg, PA 17120

/s/ W. REID LOWE

W. Reid Lowe
Counsel for Appellant

Supreme Court, U. S.
FILED
AUG 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978 No. 78-57

COMMONWEALTH OF PENNSYLVANIA, *Appellee*

v.

J & R EQUIPMENT RENTAL CO., INC., *Appellant*

COMMONWEALTH OF PENNSYLVANIA, *Appellee*

v.

FIVE-R EXCAVATING, INC., *Appellant*

MOTION TO DISMISS OR AFFIRM

On Appeal from the Supreme Court of Pennsylvania

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978 No. 78-57

COMMONWEALTH OF PENNSYLVANIA, *Appellee*

v.

J & R EQUIPMENT RENTAL CO., INC., *Appellant*

COMMONWEALTH OF PENNSYLVANIA, *Appellee*

v.

FIVE-R EXCAVATING, INC., *Appellant*

MOTION TO DISMISS OR AFFIRM

On Appeal from the Supreme Court of Pennsylvania

QUESTION PRESENTED

Is there a violation of the Equal Protection provisions of the Fourteenth Amendment when the requirement of a State filing statute provides a course of procedure which is applied to Appellant in the same manner as to all other persons in the State under similar circumstances and conditions, and that same procedure is in effect under United States Supreme Court Rule and Federal Law?

MOTION TO DISMISS OR AFFIRM

The Commonwealth (Appellee) moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the grounds that the appeal raises no substantial federal question and that Appellant's major contention below has previously been decided adversely to the Appellant's position by both this Court and the Federal Circuit Courts.

SUMMARY OF ARGUMENT

The issue raised by the Appellant in its Jurisdictional Statement does not raise a substantial federal question. Appellant's unequal protection of law contention was rejected in a well-reasoned opinion by Pennsylvania's Commonwealth Court. That Court stated that it is an established rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such procedure would also be applied to any other person in the State under similar circumstances and conditions. That Court's opinion cited *Tinsley v. Anderson*, 171 U.S. 101 (1898), in support thereof. The Commonwealth Court's opinion was affirmed by a unanimous decision of the Supreme Court of Pennsylvania.

No substantial federal question is raised by a statute which merely defines the length of time within which an appeal to a Review Board must be lodged; and the provisions of that statute are applied equally. It is within the discretion of the State Legislature to so provide.

Further, the main contention raised by Appellant in State courts was that the mailing date of the appeal should prevail over the receipt date even though the statute required filing. This question has been previously decided by this Court adversely to Appellant's position and such adverse decision affirmed frequently by the Federal Circuit Courts; and United States Supreme Court Rule 11 is consistent with those decisions.

STATEMENT OF THE CASE

The first administrative level for a hearing of a sales and use tax assessment in Pennsylvania is the Sales Tax Board of Review. In this case, after a proper hearing, that Board rendered decisions on Appellant's Petitions for Reassessment on February 14, 1975, and mailed the decisions that same day. Appellant admits receipt of the decisions on February 15, 1975, one day later. All the facts herein have been stipulated to by both parties.

The second stage of the administrative appeal process is an appeal to the Board of Finance and Revenue. The Appellant did not mail its Petition for Review (Appeal) from Pittsburgh to the Board of Finance and Revenue until sometime on the day of April 14, 1975; and the Petition was not received until April 16, 1975, at 8:36 a.m. This date was one day beyond the appeal period provided by Section 234 of the Tax Reform Code of 1971, P.L. 6, No. 2, Article I, 72 P.S. § 7234 (hereinafter referred to as the "Code").

The Board of Finance and Revenue, after a hearing, issued an Order dated August 4, 1975. This Order refused the Appellant's Petitions for Review for lack of jurisdiction due to the late filing. This Order stated that the requirements of Section 234 of the Code had not been met.

Appellant then filed an appeal to Commonwealth Court of Pennsylvania, which Court reviewed the briefs and heard oral argument. That Court filed an opinion, 28 Pa. Commonwealth Ct. 558, 368 A. 2d 1389 (1977), holding that simply mailing a Petition for Review within the specified sixty-day period did not constitute actual receipt, and that actual receipt by the Board within the period was required to satisfy filing under Section 234. The Commonwealth Court's opinion also specifically held that Section 234 of the Code did not violate any Constitutional guarantees, including equal protection of the law. There were no dissents.

The Opinion and Order of Commonwealth Court are appended to Appellant's Jurisdictional Statement as Appendix "A".

Appellant duly filed an appeal to the Supreme Court of Pennsylvania. After reviewing the briefs and hearing oral arguments in which Appellant raised the contention of a violation of equal protection, the Supreme Court of Pennsylvania unanimously affirmed the Order of the lower Court dismissing Appellant's appeal. The opinion was per curiam and is reported at — Pa. —, 384 A. 2d 240 (1978).

The Per Curiam Opinion and Order of the Supreme Court of Pennsylvania are appended at pages 14 through 16 of Appellant's Jurisdictional Statement as Appendix "A".

Appellant then filed this instant appeal.

ARGUMENT

A. This Case Presents No Substantial Federal Question.

Appellant claims that Section 234 of the Tax Reform Code of 1971, P.L. 6, No. 2, Article I, 72 P.S. § 7234, violates the Equal Protection provisions of the Fourteenth Amendment. However, Commonwealth Court correctly analyzed this contention; and in its Opinion, *Commonwealth v. J & R Equipment Rental Co., Inc.* and *Commonwealth v. Five-R Excavating, Inc.*, 28 Pa. Commonwealth Ct. 558, 368 A. 2d 1389 (1977), flatly rejected such argument. At page 562 of the Commonwealth Court Reports, that Court stated as follows:

> "Section 234 clearly provides that the sixty day appeal period is to be measured from the date of mailing of notice by the Bureau. Although it is true that the length of the interval between the mailing of notice by the Bureau and its receipt by a prospective appellant may well be dependent upon the party's geographical location relative to the place of mailing, we do not believe that the slight differential in the appeal period of individual taxpayers so resulting from differences in mail service will render the section constitutionally infirm. It is an established rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such procedure would also be applied to any other person in the state under similar circumstances and conditions. Tinsley v. Anderson, 171 U.S. 101 (1898). Section 234 gives all taxpayers a sixty day period in which to bring their appeals, and we do not find it unreasonable that the act of mailing of notice is used as the guidepost for determining the start of this period. We cannot perceive that this results in any arbitrary classification of, nor discrimination among, taxpayers."

The case cited by the Commonwealth Court, *Tinsley v. Anderson*, supra, is a leading authority. In *Tinsley*, this Court stated that the right to equal protection is not denied by a State Court when it is apparent that the same law or course of procedure would be applied to any other person in the state under similar circumstances. As stated by the Commonwealth Court in the above quote, Section 234 of the Code gives all taxpayers a sixty-day period in which to bring their appeals. That Court further stated that the statute and its application does not result in any arbitrary classification of, nor discrimination among, taxpayers.

Section 234 of the Code, 72 P.S. § 7234, is as follows:

> "Within sixty days after the date of mailing of notice by the department of the decision on any petition for reassessment filed with it, the person against whom such assessment was made, may, by petition, request the Board of Finance and Revenue to review such decision. The failure of the department to notify the petitioner of a decision within the time provided for by section 232 shall act as a denial of such petition, and a petition for review may be *filed* with the Board of Finance and Revenue within one hundred twenty days of the date prior to which the department should have mailed to the petitioner its notice of decision. Every petition for review *filed hereunder* shall state specifically the reasons on which the Petitioner relies, or shall incorporate by reference the petition for reassessment in which the reasons are stated. The petition shall be supported by affidavit that it is not made for the purpose of delay and that the facts set forth therein are true. The Board of Finance and Revenue shall act finally in disposing of *petitions filed* with it within six months after they have been received. In the event of the failure of the board to dispose of any petition within six months, the action taken by the department, upon the petition for re-

assessment, shall be sustained. The Board of Finance and Revenue may sustain the action taken by the department on the petition for reassessment, or it may reassess the tax due on such basis as it deems according to law. The board shall give notice of its action to the department and to the petitioner." (Emphasis supplied.)

The sixty-day filing period mandated by the above quoted statute, which under Pennsylvania case law means actual receipt, mandates equality. All appeals to the Board of Finance and Revenue must be actually received by the Board within the sixty days to be timely. Since the constitutionality and necessity for a limited appeal period is not questioned, the only taxpayers foreclosed are those who, like the Appellant, simply have failed to properly avail themselves of their legal remedies. To foreclose such appeals is not a violation of equal rights, but simply the law as the Legislature and the Courts have determined it should be.

The rule of law regarding Equal Protection as set down in *Tinsley*, supra, has been followed in numerous cases; a few such cases are: *Chase Securities Corporation v. Donaldson*, 325 U.S. 304 (1945); *Williams v. Arkansas*, 217 U.S. 79 (1910); *Keeley v. Evans*, 271 F. 520 (1921); *Powell v. Workmen's Compensation Board of State of New York*, 214 F. Supp. 283 (1963); *Oberlin v. Domestic Relations Court*, 159 F. Supp. 59 (1958); and most recently, *Moore v. Spangler*, 401 Mich. 360, 258 N. W. 2d 34 (1977).

In the above cited *Powell v. Workmen's Compensation Board*, the District Court stated at page 286 as follows:

> "It is well established that in order to violate the equal protection clause, a statute must discriminate against a particular class of persons."

Appellant has failed to show any particular class discriminated against by Section 234 of the Code. In fact, the

Powell case involved a statute of limitations which Appellant claimed discriminated in favor of defendants to the detriment of plaintiffs. The Court answered that contention at page 286 in the following manner:

> "Assuming, without in any way deciding that the statute has that effect, no question under the equal protection clause is thereby raised. There is nothing in the amended complaint to differentiate this case from Tinsley v. Anderson, supra, . . . Plaintiff's first claim of unconstitutionality is obviously without merit and therefore presents no substantial federal question."

Thus, the *Powell* case is quite similar on the facts and contentions to the instant appeal and the Federal District Court held there was no violation of equal protection and that Appellant presented no substantial federal question.

Appellant's equal protection contention is completely belied by this Court's own Rule 11, which Rule has exactly the same provision as the statute Appellant herein claims violates the Equal Protection Clause. United States Supreme Court Rule 11 requires that the notice of appeal be filed within ninety (90) days of the entry of judgment of the lower court. The ninety (90) day period is computed in precisely the same manner as the time for appeal was in the instant case.

Based on the foregoing, neither Section 234 of the Code, nor the United States Supreme Court Rule 11 violate the Equal Protection Clause. Therefore, there is no substantial federal question.

B. This Case Presents No Substantial Question Not Previously Decided By Federal Courts.

In the briefs and oral arguments presented to Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania, Appellant's major contention was that the mailing date of the appeal should prevail and not the actual date of receipt of the appeal by the appropriate official. Since the statute in question (Section 234 of the Code), as interpreted by Pennsylvania's Commonwealth and Supreme Courts, required filing; both Pennsylvania Courts rejected this contention.

There is a substantial amount of federal case law on the subject of what constitutes filing of an appeal. In a variety of statutory contexts, the Federal Courts, including this Court, have held that a document is filed only when the proper official actually acquires custody. In the case of *United States v. Lombardo*, 241 U.S. 73 (1916), the Supreme Court stated as follows:

> "Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office and not sent through the United States mails. A paper is filed when it is delivered to the proper official and by him received and filed." p. 76-77 (Citations omitted.)

Following the *Lombardo* rule, *Phinney v. Bank of Southwest National Association, Houston*, 335 F. 2d 266 (5th Cir. 1964), focused on the same contention as Appellant raised below in this case; *Phinney* stated: "The filing of a paper takes place upon the delivery of it to the officer at his office. Mailing is not filing. When the mails are utilized for the purpose of filing an instrument, the filing takes place upon delivery at the office of the official required to receive it." 335 F. 2d at 268.

In *Park Management v. Porter*, 157 F. 2d 688 (U.S. Emergency Court of Appeals, 1946), the issue was whether

a landlord had properly filed a document pursuant to rent regulations of the Office of Price Administration. The Court held, citing *Lombardo*, that if a landlord chooses to use the mails, the risk that papers required to be filed may not reach their destination lies with him. He takes the chance. See page 689.

The above situation is precisely what Appellant did in the instant case. Appellant mailed the Petition for Review (Appeal) on the fifty-ninth day when the statute, the regulation, and prior case law interpreting this very statute (*Commonwealth v. Niemeyer Oldsmobile*, 12 Pa. Commonwealth Ct. 388, 316 A. 2d 152 (1974)), required filing (actual receipt) by the sixtieth day. The Petition was admittedly not received until the sixty-first day. Thus, the *Phinney* case is right on point.

A more recent federal case holding that filing takes place only when the clerk acquires custody is *United States v. Easement and Right-of-Way*, 386 F. 2d 769, 771 (6th 1967), *cert. denied*, 390 U.S. 947 (1968). Thus, federal law is in accord with the Pennsylvania case and statutory law in refuting Appellant's main contention in the State Court. Therefore, this case does not present a question not previously decided by the United States Supreme Court and repeatedly affirmed by Federal Circuit Courts.

The source of Appellant's contention regarding mailing day prevailing over actual receipt when filing as required, is Judge Kramer's dissents in three Commonwealth Court opinions cited in Appellant's Statement of Jurisdiction. First, it should be noted that in the instant case, in the decisions against Appellant by the Commonwealth Court and the Supreme Court of Pennsylvania, there were no dissents.

Secondly, in all three cases in which Judge Kramer dissented, Judge Kramer was the lone member of a seven judge court dissenting. Thirdly, Judge Kramer's dissent was contra to Pennsylvania Supreme Court case law in *Walsh v. Tucker*, 454 Pa. 175, 213 A. 2d 11 (1973) and

now in that Court's decision in this case. Fourthly, Judge Kramer's dissent runs directly contra to the provisions and the application of United States Supreme Court Rule 11.

Lastly, Judge Kramer in his original dissent in *Commonwealth v. Niemeyer*, 12 Pa. Commonwealth Ct. 388, 316 A. 2d 152 (1974), placed great reliance on the fact that the record did not disclose how long after the Sales Tax Board of Review's decision was mailed taxpayer received it. In this case, taxpayer (Appellant) admitted that the decision was received the day after it was mailed, thereby giving Appellant fifty-nine (59) days to file its Petition for Review. This fact nullifies the conjectured possibility of the *Niemeyer* case, supra, dissent wherein the taxpayer would receive the decision after the sixty-day period had run.

Thus, this case presents no substantial question not previously decided adversely to Appellant by Pennsylvania Courts following many federal courts' decisions and Rule 11 of this Court.

CONCLUSION

Appellant's Jurisdictional Statement does not raise any substantial federal question which was not already considered and disposed of by the Commonwealth and Supreme Courts of Pennsylvania in the instant case and by Federal Courts in prior cases. Furthermore, the major contention raised by Appellant in the State Courts is a question which has previously been decided by the United States Supreme Court adversely to Appellant's position, and such adverse decision has been repeatedly affirmed by Federal Circuit Courts. Wherefore, the Commonwealth (Appellee) respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in this case by the Supreme Court of Pennsylvania.

Respectfully submitted,

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of Pennsylvania